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Supreme Court of the United States

OCTOBER TERM 1944

ABRAHAM JESKOWITZ,

Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of Union Fabrics, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ARCHIBALD PALMER,
Counsel for Petitioner.

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ABRAHAM JESKOWITZ,

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against

LEONARD H. CARTER, Trustee in Bankruptcy of Union Fabrics, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Abraham Jeskowitz prays that a return of certiorari issue to review the order of the Circuit Court of Appeals for the Second Circuit entered on the 9th day of February, 1945, denying a motion of petitioner for leave to reopen the turnover proceeding and to take additional testimony thereon.

Opinions Below

A decision of the Circuit Court of Appeals for the Second Circuit, not reported, made by Circuit Judges Augustus N. Hand, Henry B. Chase and Jerome N. Frank. The order of the Circuit Court of Appeals was entered on the 9th day of February, 1945. Jurisdiction of the Court is under Section 24(c) of the Bankruptcy Act and under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement of Facts

The petitioner is president of the Union Fabrics, Inc. That on the 20th day of December, 1939 an involuntary petition in bankruptcy was filed against the Union Fabrics, Inc. in the office of the Clerk of the United States District Court for the Southern District of New York. A turnover proceeding was instituted by the Trustee in Bankruptcy on or about October 25, 1940 charging the petitioner herein, as president and sole stockholder of Union Fabrics, Inc., with having failed to account for certain merchandise or the proceeds of the sale theerof, a diamond ring received as collateral by the bankrupt or the proceeds of the sale thereof and certain of the bankrupt's books and records, as follows: general ledger for 1937, journal for 1938, records and inventories of the bankrupt's merchandise taken as of January 25, 1937, May 31, 1937, January 1, 1938, May 31, 1938, October 31, 1938, December 31, 1938, January 31, 1939 and June 30, 1939 and all purchase invoices for the year 1937.

Abraham Jeskowitz appeared and interposed an answer denying the material allegations of the petition. Hearings were commenced on January 27, 1941 and continued until October 25, 1941, by which time there had been adduced 315 pages of testimony. Abraham Jeskowitz, who had no legal training, had no alternative, because of lack of funds, but to conduct his own defense to the proceedings up to September 24, 1941, when he was able to retain Chester A. Lessler, Esq. to conclude the hearing on the original petition. On October 25, 1941 the Referee granted a petition of the Trustee for leave to amend the original turnover petition predicated upon the dollar value of an opening inventory alleged to have existed as of December 31, 1938, the amount of its purchases from that date to September 28, 1939, the date of the general assignment for the benefit of the creditors, the cost of the merchandise

sold during that period at ten (10%) percent gross profit or at cost, and the value of the inventory on hand on September 28, 1939. The amended petition did not seek the turnover of the purchase invoices for the year 1937.

Additional testimony was taken based upon the amended petition and answer which denied the material allegations of said amended petition. Thereafter the Referee handed down a memorandum decision in which he accepted the figure of $197,785.05 as representing the cost of merchandise on hand on January 1, 1939 and that the cost of the merchandise sold between January 1, 1939 and September 28, 1939 was $322,587.36. This figure was based upon the presumption under Section 21-L of the Bankruptcy Act that the merchandise was sold at a price not less than cost upon the theory that the bankrupt did not turn over to the Trustee books and records which were necessary to determine the cost of the merchandise sold by the Union Fabrics, Inc. during the said period from January 1, 1939 to September 28, 1939. Based upon such presumption and upon the further presumption that the petitioner still continued in possession of the said property alleged to have been unaccounted for, the Referee found that petitioner had failed to account for and had in his possession and under his control merchandise of the cost value of $69,921.24.

The Trustee, neither by the original petition nor the amended petition, set forth that he was relying upon a presumption of law under Section 21-L of the Bankruptcy Act to establish that the merchandise sold between January 1, 1939 and September 28, 1939 was at a price not less than cost. By the amended petition the Trustee did not seek a turnover of the 1937 purchase invoices. Petitioner was therefore not advised that the Trustee sought to rely upon a presumption under Section 21-L and did not endeavor to meet such an issue. Had the Trustee indicated in his petition that he would seek to establish his contention by relying upon the presumption that the merchandise was sold at a price not less than cost, petitioner would have

sought to introduce evidence to show that the Trustee was in a position to ascertain the actual cost of the merchandise sold by the bankrupt during the period January 1, 1939 to September 28, 1939 from the books and records which had actually come into the Trustee's possession. The fact that the Trustee in his amended petition omitted any reference with respect to the 1937 purchase invoices misled the petitioner into believing that the claim which was made by the Trustee in his original petition that such invoices were missing was abandoned. For such reason, too, petitioner offered no evidence with respect to the 1937 purchase invoices. The Referee used as a basis for the finding that the merchandise was sold at a price not less than cost the legal presumption afforded by Section 21-L of the Bankruptcy Act, even though petitioner had not been put on notice during the course of the trial of the issues that the Trustee intended to rely upon such legal presumption.

A petition to review the said order of the Referee was filed by petitioner. The Referee's order was affirmed by order of the District Court on May 6, 1943. A notice of appeal was filed in the Circuit Court of Appeals. The Circuit Court of Appeals rendered a decision in which a main and concurring opinion were written. Circuit Judge Frank, in a concurring opinion, stated as follows:

> "I concur but with the hope, expressed by Judge Learned Hand in Robbins v. Gottbetter, 2 Cir., 134 F. 2nd 843, 844 and Seligson v. Goldsmith, 2 Cir., 128 F. 2d 977, 978, 979, that the Supreme Court will soon grant certiorari in some such case as this and overrule precedents that fasten upon us what seems to him and me an irrational rule of presumption, obviously contrary to fact, which enables trustees in bankruptcy to employ civil actions as substitutes for criminal proceedings."

Petitioner thereupon filed a petition for a writ of certiorari to review the order of the Circuit Court of Appeals

for the Second Circuit entered on August 2, 1944. This petition for writ was denied by this Court on December 11, 1944.

In connection with the argument submitted in support of petitioner's application for a writ of certiorari three points were discussed, as follows:

A

There is a conflict of authority within the Circuit Court of Appeals for the Second Circuit on the question of when a trustee may rely on a presumption of continued possession resulting in the suggestion by the Circuit Court of Appeals for the Second Circuit, in its recent decisions, that this question be reviewed and finally determined by the Supreme Court of the United States

and in support thereof petitioner's counsel cited such cases as

Seligson v. *Goldsmith,* 128 F. (2d) 977,

wherein Circuit Judge Learned Hand expresses the considered opinion that the Supreme Court, which has never committed itself to the presumption of continued possession, should finally determine the question and, at page 979, stated as follows:

> "The Supreme Court has never committed itself to the presumption, and perhaps at some time may think it desirable finally to determine the question."

Robbins v. *Gottbetter,* 134 F. (2d) 843,

wherein the Circuit Court expresses the view again that they were following the earlier decisions against their better judgment and, at page 844, states as follows:

> "The whole proceeding is, to the minds of us two, an abuse of the process of the Bankruptcy Court; but, until the Supreme Court, which has never really considered the matter, sees fit to change the law as it has been settled, we regard ourselves as concluded."

In re Danish v. *Sofranski*, 93 F. (2d) 424,

wherein the same Circuit Court held that the trustee was obliged to prove not only that the respondents had wrongfully abstracted the money but how much of it they had in their hands when the Referee's order passed.

In re Schoenberg, 70 F. (2d) 321,

where the Circuit Court of Appeals, at page 323, stated as follows:

> "But the turnover order cannot stand. A turnover order presupposes that the person against whom it is directed has possession of the property or money which he is directed to deliver up. In re Redbord, 3 F. (2d) 793 (C. C. A. 2). In the case at bar the trustee made no attempt to show what part of the merchandise originally transferred was still on hand or that the appellant had the sum of money which in the alternative it was directed to pay over."

In re Matter of Pinsky-Lapin & Co., 98 F. (2d) 76,

which distinctly shows the conflict existing within the Circuit Court of Appeals for the Second Circuit.

These cases not only show a conflict of opinion among the Judges of the Second Circuit but also express a desire on their part that the Supreme Court should consider the question and determine it.

B

There is a conflict of authority on the question of presumption of continued possession among several circuits on the question of law involved in the case at bar, and there should be a unanimity of opinion among the various circuits with regard to this question

In support of this point there were cited the following cases decided in the Circuit Court of Appeals for the Sec-

ond Circuit which support the presumption of continued possession:

Matter of Pinsky-Lapin & Co. (cited supra);
In re H. Magen Co., 10 F. (2d) 91;
In re Steinreich Associates, Inc., 93 F. (2d) 254.

There was also cited

Marin v. *Ellis* (C. C. A. 8), 15 F. (2d) 321,

which holds a contrary view to that of the Second Circuit.

There was cited

In re J. L. Marks (C. C. A. 7), 85 F. (2d) 392,

which holds that the burden is upon the trustee to actually prove present possession rather than rely upon a presumption of continued possession, and also

In re Samel v. *Dodd* (C. C. A. 5), 142 Fed. 68,

which followed the line of decisions that the trustee should establish possession of the property in the respondent without regard to the presumption.

C

The Trustee did not offer any proof to show that petitioner had, at the date of the turnover order, any property of the bankrupt, although the law requires that the Trustee establish all the elements of a turnover proceeding by clear and convincing proof

The Referee in the case at bar reached his conclusion by the presumption allowed by law under Section 21-L and also by a presumption of continued possession of the property found to have been unaccounted for as of September 28, 1939.

All courts have recognized that motions for turnover orders are serious proceedings. They are serious for the trustee because he is entitled to property which belongs

to the estate. They are much more serious to the respondent because if there is a failure of that clear evidence referred to by Chief Justice Taft in *Oriel* v. *Russell*, 278 U. S. 358, 49 S. Ct. 173, pointing to them as possessors of the property in question, they may be involved in the predicament of having to go to jail for not doing something that they cannot possibly do.

In

In re Boyd v. *Glucklich*, 116 Fed. 131, 140,

the Court stated:

> "The referee's conclusion seems to have been reached mainly, if not altogether, by approximate estimates, inferences, and conjectures, which, while they give rise to very strong suspicion, fall short of direct and conclusive proofs. The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass."

The Trustee should not be relieved of the burden placed upon him to prove by affirmative evidence that petitioner had failed to account for the merchandise or its proceeds alleged to be in the sum of $69,921.24, and how much remained at the date of the making of the turnover order.

In

Epstein v. *Steinfeld* (C. C. A. 3), 210 Fed. 236, 239

(cited with approval in *Oriel* v. *Russell*, cited supra), the Court said:

> "The second stage is to determine whether or not the property required is still in the possession or control of the bankrupt and that he is physically able to deliver it to his trustee."

Steps taken by petitioner to reopen the turnover proceedings for permission to introduce testimony to show that the Trustee did have books and records from which he could ascertain the cost price of the merchandise sold

After the Circuit Court of Appeals rendered its decision petitioner sought the advice of Morris H. Gotthilf & Company, certified public accountants, and Archibald Palmer, attorney, with respect to this matter. Said accountant made a study and analysis of the books and records and found that *it was possible for the Trustee to ascertain the cost of merchandise sold from the books and records which had been in possession of the Trustee in Bankruptcy,* as follows:

(a) *Sales Book*—This book contains an original duplicate copy of the bill given or sent to the customers, showing in detail the information as to when the merchandise was sold, identifying the merchandise by the Union Fabrics, Inc. quality number, Union Fabrics, Inc. piece goods number, the yardage sold and the sales price.

(b) *Perpetual Inventory Book*—This book contains the account of the piece goods bought and indexed by the Union Fabrics, Inc. quality number. This quality number refers to the Union Fabrics, Inc. piece goods number, the mill greige goods number, dye lot number, quantity received and quantity shipped.

(c) *Dye Book*—This book contains the following information: The name of the dyer, date returned from the dyer, name of the greige goods mill, greige goods quantity number, mill number, yardage sent to the dyer, and the finished yardage returned by the dyer. This book also indicates the shrinkage, if any, in the dyed goods.

During the course of said examination of the books and records petitioner's accountants traced, from the sales book,

by referring to the quality number, the merchandise so designated into the perpetual inventory book identified by the same number and in the perpetual inventory book there was found the references to the dye lot numbers; by referring to the dye book under that particular dye lot number there appeared the name of the person from whom the merchandise was bought and also the name of the person by whom the merchandise was dyed. Upon establishing the name of the mill and the name of the dyer reference was then made to the invoices from the said firms which showed the cost of the particular merchandise as described in the sales book. Petitioner's accountants also found that the journal for the year 1938, the general ledger and the inventory sheets were not necessary for the purpose of determining the cost of the individual sales.

Based upon such findings petitioner made an application to the Referee to reopen the turnover proceeding for the purpose of enabling petitioner to submit testimony that the Trustee was not entitled to rely upon the presumption afforded by Section 21-L of the Bankruptcy Act and that the said Trustee was required to prove the actual cost of the merchandise sold. The Referee denied this motion upon the ground that he could not entertain the same unless petitioner had first obtained permission from the Circuit Court to apply for such relief to the Referee.

Petitioner thereupon made an application to the United States Circuit Court of Appeals for an order authorizing petitioner to apply before the Referee to reopen the turnover proceedings and to take additional testimony thereon. This motion was denied by the Circuit Court of Appeals on the 9th day of February, 1945.

Reason Relied on for the Allowance of the Writ

The Circuit Court erred as a matter of law in refusing to grant the motion for the reason that the due process of law clause of the Constitution requires that a person shall not be deprived of his liberty without having an opportunity to present every available defense.

Summary of Argument

The failure of the Trustee to give notice to the petitioner of an intention to rely upon the presumption afforded by Section 21-L of the Bankruptcy Act and thereby give him an opportunity to present every available defense deprived petitioner of due process of law as required by the Constitution

The Trustee, in his petition, made no reference to Section 21-L of the Bankruptcy Act. After all of the testimony was adduced and the hearing was closed the Referee made a finding that the merchandise was sold at a price not less than cost based upon the presumption of law under Section 21-L and not upon proof as to actual cost. Petitioner, during the course of the hearing, was not advised of any contention by the Trustee that he relied upon Section 21-L of the Bankruptcy Act and did not therefore present testimony to show that the Trustee did have in his possession books and records from which the cost price of the merchandise sold during the period in question could be ascertained.

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty or property without due process of law. In the case at bar petitioner will be deprived of his liberty if an opportunity is not given to present the evidence which is necessary to refute the proposition that the Trustee is

entitled to rely upon a presumption of law under Section 21-L. The evidence sought to be introduced is to the effect that the Trustee has in his possession books and records from which he could ascertain the cost price of the merchandise sold during the period in question. The order which provided for the turnover of $69,921.24 was based upon this presumption of law and upon the further presumption that the petitioner still continues to be in possession of that property. If petitioner is not permitted to submit this evidence at a reopened hearing then a motion to punish for contempt for failure to comply with the order directing the turnover of the said money will be granted and petitioner will be incarcerated until he complies with such order or until the Court is satisfied that he is unable to comply therewith. Under such circumstances petitioner will be deprived of his liberty without due process of law.

One of the basic requisites of due process when applied to judicial proceedings is that the parties shall have notice and an opportunity to present every available defense. To that effect see

In re Rosser, 101 Fed. 562, 567, 568,

where the Court stated:

> "And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principle of our laws, and cannot be sustained. Gentry v. U. S. (C. C. A.), 101 Fed. 51; Burton v. Platter, 10 U. S. App. 657, 663, 4 C. C. A. 95, 99, 53 Fed. 901, 905; Windsor v. McVeigh, 93 U. S. 274, 277, 278, 23 L. Ed. 914; Capel v. Child, 2 Cromp. & J. 558, 574; Hovey v. Elliott, 167 U. S. 409, 414, 416, 446, 17 Sup. Ct. 841, 42 L. Ed. 215; Galpin

v. Page, 18 Wall. 350, 368, 21 L. Ed. 959; Underwood v. McVeigh, 23 Grat. 409, 413; Henry v. Carson, 96 Ind. 412; Hovey v. Elliott, 145 N. Y. 126, 39 N. E. 841; Taussig's Ex'rs v. Glenn, 4 U. S. App. 524, 541, 2 C. C. A. 314, 318, 51 Fed. 409, 413; Merrill v. Rokes, 12 U. S. App. 183, 188, 4 C. C. A. 433, 435, 54 Fed. 450, 452."

In

State of Kansas ex rel. Beck, Atty. Gen. et al. v. *Occidental Life Ins. Co. et al.*, 95 Fed. (2d) 935,

the Court, at page 937, stated as follows:

"The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights which may be affected, the order, judgment, or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense."

It follows in the case at bar that if petitioner was not advised by the Trustee of his intention to rely upon a presumption of law under Section 21-L petitioner did not have the opportunity to present a defense in connection therewith.

The Courts have recognized that a bankrupt in a turnover proceeding should be so advised so that he could have an opportunity to present a defense and refute the contention.

In

In re Victor's Ladies Shop, Inc., 45 Fed. Supp. 417,

the Court in a supplemental opinion stated, at page 421, as follows:

"Although the opportunity was made available, the bankrupt did not offer any additional testimony to rebut the presumption raised by section 21, sub. 1, despite my specific ruling ' * * that where a presumption of continued possession is raised, it is incumbent upon*

> *the bankrupt either to account for the non-production of the property or to show his inability to comply with a turnover order*'." (Italics writer's.)

The inference is that had an opportunity not been made available to offer additional testimony to rebut the presumption raised by Section 21, subdivision L, then such opportunity would have been granted at any time, regardless of whether a decision had already been rendered. It seems that not only due process of law requires that such opportunity be given but that justice requires that petitioner should be permitted to introduce evidence for the failure of such opportunity would deprive him of his liberty.

Similar reasoning was used in

In re Fisher, 32 Fed. Supp. 69,

where the Court, at page 73, stated as follows:

> "It is recognized that the making of a turnover order is a serious step in a bankruptcy proceeding which may involve further important consequences; and before it is finally made the fullest opportunity should be given the parties, and especially to the bankrupt, to submit all available testimony that can have a proper bearing on the issue. Even if the bankrupt still fails to give any credible explanation of the disposition of the missing merchandise and books, or otherwise to account therefor, still the turnover order should not be passed if the referee is satisfied from further evidence that it is entirely beyond the power of the bankrupt to comply with the order. May v. Henderson, supra, 268 U. S. page 120, 45 S. Ct. 456, 69 L. Ed. 870; Kirsner v. Taliaferro, supra, 202 F. page 60."

To deny petitioner the right to introduce this further evidence would be equivalent to sending him to jail for refusing to comply with an order where he has not the ability and where he never did have the ability to comply, and where there never was a shortage in the first instance.

Conclusion

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that this important question may be determined and that to such end a writ of certiorari be granted and that this Court review the decision of the Circuit Court of Appeals and finally reverse it.

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